

No. 125952

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 Carolyn Taft Grosboll
 SUPREME COURT CLERK

IN THE
 SUPREME COURT OF ILLINOIS

DARREN BAILEY,	)	Motion for Direct Appeal Under
	)	Illinois Supreme Court Rule 302(b)
Plaintiff-Respondent,	)	and/or Supervisory Order under
	)	Illinois Supreme Court Rule 383
and)	
)	
THE HONORABLE JUDGE	)	On Appeal from the Circuit Court
MICHAEL D. McHANEY,	)	for the Fourth Judicial Circuit,
	)	Clay County, Illinois, No. 2020 CH
Respondent,	)	6, to the Appellate Court of Illinois,
	)	Fifth Judicial District, No. 5-20-
v.	)	0148
)	
GOVERNOR JAY ROBERT)	
PRITZKER, in his official capacity,	)	The Honorable
	)	MICHAEL D. McHANEY,
Defendant-Petitioner.	)	Judge Presiding.

**PETITIONER’S SUPPLEMENTAL EMERGENCY MOTION FOR
 SUPERVISORY ORDER UNDER ILLINOIS SUPREME COURT RULE 383**

On April 29, 2020, Governor J.B. Pritzker filed a motion requesting leave under Illinois Supreme Court Rule 302(b) for a direct appeal to this Court from the circuit court’s order granting a temporary restraining order (“TRO”) and/or summary reversal of that TRO pursuant to this Court’s supervisory authority under Illinois Supreme Court Rule 383. The Governor also filed a direct appeal and petition under Illinois Supreme Court Rule 307(d) to the Illinois Appellate Court, Fifth District.

On April 30, 2020, however, Respondent Darren Bailey filed a document with the appellate court purporting to consent to an order vacating the TRO and

remanding the case to the circuit court for proceedings consistent with that order. On May 1, the appellate court entered an order pursuant to that request vacating and dissolving the TRO.

Because the TRO has now been dissolved, the Governor withdraws his request for direct appeal under Rule 302(b) and for summary reversal of that order under Rule 383. The Governor maintains his request for supervisory relief under Rule 383, which included a request for a stay of circuit court proceedings. Given the changed circumstances brought about by Bailey’s decision to consent to the vacatur of the TRO he had sought and obtained, the Governor now seeks under Rule 383 resolution of the underlying legal question presented by this case—that is, whether the Governor acted within the scope of his authority under the Illinois Emergency Management Act (“Act”), 20 ILCS 3305/1, *et seq.*, and the Illinois Constitution when he issued disaster proclamations and executive orders in response to the COVID-19 pandemic—and a stay of the circuit court proceedings pending resolution of this supplemental motion. In support of this request, the Governor states as follows:

1. On March 9, 2020, the Governor proclaimed the COVID-19 pandemic a disaster in Illinois pursuant to his power under the Act and the Illinois Constitution. SR10-13.¹ He then entered a series of executive orders designed to stop the spread of COVID-19 and enhance the availability of testing and treatment for the disease, including EO-2020-10, which directs individuals to remain at home

¹ Citations in this supplemental motion to “SR__” are to the supporting record submitted in support of the Governor’s April 29, 2020 motion.

except for essential activities.² On April 1, 2020, the Governor issued a second disaster proclamation, recognizing that “circumstances surrounding COVID-19 constitute a continuing public health emergency,” SR23-25, as well as EO-2020-18, which continued the stay-at-home directive, SR14-22. Because COVID-19 continues to infect individuals across the State, on April 30, 2020, the Governor issued a new disaster proclamation and new stay-at-home directives for an additional 30 days.³

2. On April 23, 2020, Bailey filed suit against the Governor, seeking a declaration that the Governor’s emergency powers lapsed 30 days after the initial disaster proclamation and an injunction preventing the Governor from enforcing the stay-at-home order against him. SR2-8. He then filed a motion for a TRO and preliminary injunction. SR37-40.

3. On April 27, 2020, the circuit court entered a TRO that prevents the Governor from enforcing or entering any executive order against Bailey “forcing him to isolate and quarantine in his home.” SR243. The circuit court rested its order on the legally erroneous conclusion that Bailey was likely to succeed on the merits of his claim the Governor’s emergency powers lapsed 30 days after the first proclamation. That same day, the Governor filed an interlocutory appeal under Rule 307(d) to the appellate court. SR315-20.

4. On April 29, 2020, the Governor filed a petition for review in the

² See Exec. Orders Nos. 2020-3 to 2020-34, *available at* <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrders.aspx>.

³ See *id.*; Gubernatorial Disaster Proclamation, Apr. 30, 2020, *available at* <https://www2.illinois.gov/sites/gov/Documents/CoronavirusDisasterProc-4-30-2020.pdf>.

appellate court, seeking entry of an order reversing and vacating the circuit court's April 27 order.⁴ That same day, the Governor filed an emergency motion in this Court requesting leave under Rule 302(b) for a direct appeal to this Court and/or supervisory relief under Rule 383.⁵ Through this motion, the Governor sought an order reversing and vacating the circuit court's TRO, including the circuit court's finding that Bailey was likely to succeed on the merits of his argument the Governor's emergency powers lapsed 30 days after the initial disaster proclamation.⁶

5. On April 30, 2020, Bailey filed in the appellate court his consent to entry of order vacating temporary restraining order.⁷

6. On May 1, 2020, the appellate court entered an order vacating and dissolving the April 27 circuit court order granting Bailey temporary injunctive relief.⁸

7. Because the appellate court entered an order vacating and dissolving the TRO, the Governor withdraws his Rule 302(b) request for direct appeal of that

⁴ See Order, *Bailey v. Pritzker*, No. 5-20-0148 (Ill. App. Ct. 5th Dist. May 1, 2020), available at https://courts.illinois.gov/R23_Orders/AppellateCourt/2020/5thDistrict/5200148_R23.pdf.

⁵ See Petitioner's Emergency Motion for Direct Appeal under Illinois Supreme Court Rule 302(b) and/or Supervisory Order under Illinois Supreme Court Rule 383, *Bailey v. Pritzker*, No. 125952 (Ill. S. Ct. Apr. 30, 2020), available at https://courts.illinois.gov/SupremeCourt/SpecialMatters/2020/125952_MOT.pdf.

⁶ *Id.*

⁷ See Order, *supra* note 4.

⁸ *Id.*

order and his Rule 383 request for summary reversal of that order.

8. The Governor maintains his request, however, that this Court exercise its supervisory authority to resolve the underlying legal question presented by this case and stay the circuit court proceedings pending resolution of his motion.

Supervisory relief is warranted if the normal appellate process will not afford adequate relief and, among other reasons, the dispute involves a matter of importance to the administration of justice or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority. *See Vasquez Gonzalez v. Union Health Servs., Inc.*, 2018 IL 123025, ¶ 17.

9. As detailed in the Governor's April 29 emergency motion, the exercise of supervisory authority is appropriate here because the normal appellate process will not afford sufficient relief and because the resolution of the underlying legal question presented will have a profound effect on the Governor's response to the public health emergency presently facing Illinois.⁹ The dissolution of the TRO, which will prolong the normal appellate review process, only heightens these considerations.

10. Indeed, the deleterious effects of the circuit court's order—even though dissolved—will not cease unless and until this Court makes a definitive pronouncement on the scope of the Governor's authority to protect the health, safety, and welfare of Illinois residents during a global pandemic. As one example, there are already indications that the uncertainty over the lawfulness of the

⁹ *See* Emergency Motion, *supra* note 5, at 25-27.

Governor's emergency actions has caused individuals to stop complying with the stay-at-home directives. Two days after the court entered the TRO, a COVID-19 positive individual living in Bailey's district visited three stores in violation of the stay-at-home order.¹⁰ And on May 1, 2020, protestors gathered in Chicago and Springfield in violation of the stay-at-home order.¹¹ Additionally, the initial entry of the TRO has caused litigants to file similar suits seeking relief from the stay-at-home orders.¹² Similar lawsuits will likely follow in Illinois courts, which are already minimizing operations, and lead to a patchwork of conflicting orders when concerted guidance is needed.

11. Furthermore, the dissolution of the TRO does not preclude review by this Court under Rule 383, which is "unlimited in extent and hampered by no specific rules." *Vasquez Gonzalez*, 2018 IL 123025, ¶ 16. In fact, this Court has previously exercised its supervisory authority in cases where the parties did not even seek review of the judgment below. *See, e.g., In re Estate of Funk*, 221 Ill. 2d 30, 98 (2006) ("Pursuant to our supervisory authority, we have jurisdiction to

¹⁰ Capitol Fax, *Officials on alert in Rep. Darren Bailey's district after COVID-positive resident violates self-isolation order*, Apr. 29, 2020, <https://capitolfax.com/2020/04/29/officials-on-alert-in-rep-darren-baileys-district-after-resident-violates-local-self-isolation-order/>.

¹¹ Madeline Buckley & Jamie Munks, *Protestors demanding Gov. Pritzker end stay-at-home order gather outside Thompson Center, in front of state Capitol in Springfield*, May 1, 2020, <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-reopen-protest-loop-thompson-center-20200501-u5swaqzdgvhxhnlph4pu72prfq-story.html>.

¹² Complaint, *Cabello v. Pritzker*, No. 2020 CH 0000210 (17th Judicial Circuit, Circuit Ct., Winnebago Cty., Apr. 29, 2020); Complaint, *James Thompson v. Pritzker*, No. 20-CV-2853 (N.D. Ill. Apr. 29, 2020); Complaint, *Running Central, Inc. v. Pritzker*, No. 2020-CH- (10th Judicial Circuit, Peoria Cty., May 1, 2020).

evaluate judgments of the lower courts even where the litigants themselves may have raised no challenge.”); *City of Urbana v. Andrew N.B.*, 211 Ill. 2d 456, 470 (2004) (using supervisory authority to address issue not raised by parties due to “grave concerns about the procedures employed in these cases” that “warrant correction”); *McDunn v. Williams*, 156 Ill. 2d 288, 300-03 (1993) (importance of issue merited supervisory authority to guide lower courts even though no party appealed).

12. Moreover, the mootness doctrine does not prevent this Court from reviewing whether the Governor acted within his authority. Courts of review generally will not decide questions that are moot, in the sense that “the issues involved in the trial court no longer exist because intervening events have rendered it impossible for the reviewing court to grant effectual relief.” *In re James W.*, 2014 IL 114483, ¶¶ 18, 19. But a reviewing court may decide issues that are moot under various exceptions to mootness, including the public interest exception, and the exception for issues capable of repetition but evading review. *Id.* ¶ 20 (holding that public interest exception applied); *In re Benny M.*, 2017 IL 120133, ¶¶ 19-24 (finding applicable exception for issues capable or repetition but evading review); *see generally In re Alfred H.H.*, 233 Ill. 2d 345, 355, 358 (2009) (stating elements of both exceptions). Accordingly, to the extent this Court determines that the underlying question is moot, it is not precluded from reaching the question because both of these exceptions apply here.

13. “The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need

for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question.” *In re Lance H.*, 2014 IL 114899, ¶¶ 13-14; *see also In re James W.*, 2014 IL 114483, ¶ 21. The present situation meets these criteria.

14. First, the public nature of the question presented is plain. The fundamental issue raised in this case concerns the Governor’s legal authority—either under the statutory powers granted to him by the Act, or under his inherent constitutional authority to deal with a sudden crisis that caused the General Assembly not to convene—to protect the health of all Illinois residents during an emergency (in this case the current COVID-19 epidemic). A legal question of a more public nature could hardly be imagined.

15. Second, there is a need for an authoritative determination for the future guidance of public officers. Bailey’s consent to vacating the circuit court’s TRO does not eliminate the need for definitive judicial guidance on whether the Governor has legal authority to take the actions he has taken, and is continuing to take, to protect the public’s health and safety. As noted in the Governor’s April 29 motion, in the wake of the circuit court’s order in this case, other litigation has been initiated challenging the Governor’s legal authority to issue his executive orders addressing the COVID-19 crisis; more litigation raising the same issue is inevitable; and members of the public appear to be acting (and may continue to act) on the belief that the Governor’s orders are legally invalid as a result of the circuit court

ruling in this case.¹³ The necessity for prompt and definitive guidance is compelling.

16. Third, there is unquestionably a likelihood of future recurrence of the question raised in this case. Bailey agreed to have the TRO vacated, but he did not voluntarily dismiss his case with prejudice. So in this case alone, the question is likely to recur. And, again, other litigation will certainly present the same question. Resolving that question sooner rather than later, after a period of needless uncertainty about whether the Governor's executive orders are legally authorized, will greatly serve the public interest.

17. Alternately, this case satisfies the mootness exception for issues that are capable of repetition but evade review because it meets the two applicable elements: "First, the challenged action must be of a duration too short to be fully litigated prior to its cessation. Second, there must be a reasonable expectation that the same complaining party would be subjected to the same action again." *In re Alfred H.H.*, 233 Ill. 2d at 358 (citation and internal quotations omitted); *see also In re Benny M.*, 2017 IL 120133, ¶ 19.

18. The challenged action—a TRO—is by definition brief. And where, as here, its validity is appealed under Rule 307(d) yet the party who sought and obtained it agreed to vacatur, there is no opportunity to adjudicate the TRO's validity, including the merits of the underlying legal claim, before it has ceased to operate absent application of a mootness exception. In addition, there is a

¹³ *See* Emergency Motion, *supra* note 5, at 14-16.

reasonable expectation that the same complaining party, here the Governor, would be subjected to the same action again. Indeed, Bailey, apparently seeking to manipulate the court system to his advantage, has reserved the right to have the same issue decided against the Governor. But he should not be given a veto over where, and when, the courts ultimately decide that issue. Instead, this Court should now take the issue that he first raised (and reserves the right to raise again) and decide it for the benefit of the Governor and all the people of Illinois.

WHEREFORE, Defendant-Petitioner J.B. Pritzker, in his official capacity as Governor of the State of Illinois, respectfully requests that this Court, pursuant to Illinois Supreme Court Rule 383 stay the circuit court proceedings pending its decision and reverse the circuit court's holding that Bailey was entitled to a TRO

because he is likely to succeed on the merits of his complaint.

Respectfully submitted,

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GOVERNOR JAY ROBERT)	
PRITZKER, in his official capacity,)	The Honorable
)	MICHAEL D. McHANEY,
Defendant-Petitioner.)	Judge Presiding.

ORDER

THIS CAUSE COMING TO BE HEARD on motion of Defendant-Petitioner for supervisory relief under Illinois Supreme Court Rule 383, due notice having been given, and the Court being fully advised,

IT IS HEREBY ORDERED that that the motion for supervisory relief is GRANTED / DENIED; and

it is further ORDERED that the proceedings pending in the circuit court are STAYED.

ENTER: _____

JUSTICE

DATED: _____

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing Supplemental Emergency Motion with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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I further certify that another participant in this appeal, named below, is not a registered service contact on Odyssey eFileIL system, and thus I have caused the foregoing document to be mailed by First-Class Mail, postage prepaid, by having it placed in the U.S. Mail at 100 West Randolph St., Chicago, Illinois 60601, on May 1, 2020, and addressed to:

The Honorable Michael D. McHaney
Clay County Courthouse
111 Chestnut
Louisville, IL 62858

Under penalties, as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Sarah A. Hunger
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